IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT ..... PETITIONER

V.

KENTUCKY PAROLE BOARD, ET AL. ..... RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS ACTION IS NOW MOOT?

II. WHETHER A CONSTITUTIONALLY COGNIZABLE INTEREST IN LIBERTY IS AT STAKE IN KENTUCKY PAROLE CONSIDERATION PROCEEDINGS SUCH THAT THE PROTECTIONS AFFORDED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ATTACH THERETO?

III. ASSUMING THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO PAROLE CONSIDERATION PROCEEDINGS IN KENTUCKY, WHAT FORM OF PROCESS IS DUE?

STATEMENT OF THE CASE

After having been denied parole release at the conclusion of individual hearings held before the respondents, the petitioner and Calvin Bell[1] initiated an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Kentucky. The action challenged the parole consideration and hearing procedures utilized by the respondents as being in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint sought declaratory and injunctive relief, was tendered as a class action on behalf of all other persons similarly situated, and was accompanied by a motion to proceed *in forma pauperis*. However, the District Court, without benefit of responsive pleadings, overruled the motion to proceed *in forma pauperis* and dismissed the action, stating that "[t]he procedural dictates of the Due Process Clause are activated only upon the deprivation of a right or entitlement of constitutional magnitude. Although the loss of freedom resulting from revocation of parole merits due process applicability (citations omitted), the denial of parole wreaks no such 'grievous loss'." (Appendix, hereinafter App., 14). Plaintiffs' subsequent motion for leave to appeal *in forma pauperis* was denied by the District Court on the ground that it was not taken in good faith.

However, a similar motion presented to the United States Court of Appeals for the Sixth Circuit was granted

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1/ Bell was subsequently released from incarceration on May 29, 1974, and, according to the petitioner, is now deceased.

and the case was submitted to that Court upon the record, briefs and oral arguments of counsel. Thereafter, on January 15, 1975, the Court of Appeals affirmed the decision of the District Court, concluding that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." (App., 21). A subsequent petition for rehearing and suggestion of the appropriateness of a rehearing *en banc* was denied by the Court of Appeals on April 2, 1975.

On December 15, 1975, this Court granted certiorari. Thereafter, respondents filed a suggestion of mootness predicated upon the ground that the petitioner had been released on parole as of November 26, 1975. In response thereto, petitioner filed motions before this Court for substitution of parties and for intervention. After the respondents filed a response to the aforementioned motions this Court deferred action thereon to the hearing of the case on the merits.

SUMMARY OF ARGUMENT

I. The threshold determination to be made by this Court is whether the case at bar is now moot as a consequence of the petitioner having been paroled. The respondents urge that petitioner's current status as a parolee has in fact rendered this case moot since the petitioner is no longer subject to the procedures which are questioned on the merits of this action and has no present interest which is affected thereby. Furthermore, this action does not remain alive upon the ground that it is alleged to be a class action. Although this cause was

initiated as a class action it was never certified. Nor has it ever been judicially determined whether the petitioner has complied with the many prerequisites mandated by Federal Rule of Civil Procedure 23, and any variance therewith could be fatal to a classa action allegation. Moreover, the very nature of the parole consideration proceedings at issue here are uniquely personal insofar as they affect individual prisoners, thus militating against the appropriateness of class action application. Furthermore, an action such as this would be more suitable to a habeas corpus proceeding since if the procedures now utilized by respondents are unconstitutional, a question of possible illegal incarceration arises. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1975).

Finally, petitioner's motion for substitution or alternatively for intervention is not well taken. Although there are circumstances wherein such relief would be proper, the respondent questions the propriety of permitting substitution or intervention here where the case has not been certified as a class action; where the affidavits of those individuals seeking substitution reveal dissimilar factual situations; and, where the relief requested by such a motion is merely an attempt to keep alive a case which is otherwise moot and should be dismissed.

II. The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not extend to parole consideration proceedings utilized by the respondents in determining whether petitioner should be released on parole. The nature of the interest at stake

in such a proceeding is not one which would fall within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Although petitioner maintains that a substantial interest in liberty is implicated, petitioner had no interest in liberty at the time these proceedings affected him because he had previously been constitutionally deprived of liberty by mandate of law. Petitioner's mere hope or anticipation of possibly being extended a parole at these proceedings did not rise to a constitutionally cognizable interest which would require procedural due process protection. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Unlike the situation in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Commonwealth of Kentucky had not extended to the petitioner a state created right which it then revoked. Under Kentucky statutes and regulations the petitioner was given the right to be considered for parole after having served a certain portion of his sentence. KRS 439.330, KRS 439.340, KRS 439.350; .501 Kentucky Administrative Regulation 1;010. Pursuant to the foregoing authority the respondents are given broad discretion in determining whether a parole should be granted. That determination can be made only after numerous factors involving many disciplines and factors are considered. Even then, "[A] parole shall be ordered only for the best interest of society . . . and when the board [respondents] believes he [a prisoner] is able and willing to fulfill the obligations of a law abiding citizen." KRS 439.340. Under these circumstances the

petitioner acquired no interest in liberty which would require the extension of procedural due process protections to parole consideration proceedings in Kentucky.

III. Because the actual facts of this case as opposed to those pleaded by the petitioner have never been developed, if this Court holds that the Due Process Clause of the Fourteenth Amendment applies to Kentucky parole consideration proceedings, respondents respectfully submit that the case should be remanded for development of an evidentiary basis for determining what process is due. If the Court elects to proceed to the question of what process is due based upon the present record, repondents contend that the nature of Kentucky parole consideration proceedings militates against imposition of the adversary procedures which petitioner claims are constitutionally required. Each of the specific rights which petitioner claims as his due fly in the face of the non-adversary nature of those proceedings and would create overwhelming administrative difficulties without according substantial benefits to individual prisoners. Petitioner's requests for notice of information contained in his file, compulsory process for production of evidence, counsel at parole consideration interviews and a written statement of reasons for parole deferments contemplate a court created parole consideration procedure far different from that created by the Kentucky General Assembly. If the Kentucky legislature cannot in conformity with the Due Process Clause create the kind of parole system which the respondents administer, then it is the organic law of that system, not the procedures utilized by the respondents, which is constitution-

ally infirm. If the legislature has not acted invalidly, then the relief requested by the petitioner must be deemed merely a request for a change in legislative policy to be implemented by that body, not by this Court.

ARGUMENT

I

THIS CAUSE IS NOW MOOT SINCE THE PETITIONER HAS BEEN GRANTED PAROLE.

After this Court granted *certiorari* on December 15, 1975, the respondents filed a suggestion of mootness predicated upon the ground that the petitioner had been released on parole as of November 26, 1975. Thereafter, petitioner filed a response to the suggestion of mootness as well as a motion for leave to substitute named petitioners or, in the alternative, to intervene. This Court has deferred consideration of those matters to the hearing of the case on the merits. Respondents respectfully submit that the cause has been rendered moot due to the petitioner's release on parole.

In his response to the suggestion of mootness the petitioner maintained that although he was released on parole, this case remains alive because he is subject to parole supervision and the possibility remains that his parole may be revoked. Thus, he concludes that this controversy, insofar as it concerns him, is capable of repetition but evades review. But, if anything, the presumption should be entertained that the petitioner will not have his parole revoked. However, the respondents submit that the mere possibility that petitioner's parole may at some future date be revoked is purely speculative and completely insufficient to avoid the applicability

of the doctrine of mootness in the case at bar. In order to avoid the effect of mootness, the petitioner must show that in all *probability* he will again be subject to the parole consideration procedures as utilized by the respondents. *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498 (1911). Respondents contend that the petitioner has failed to demonstrate such a probability exists.

Weinstein v. *Bradford,* 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975), a case similar to the one at bar, was vacated as moot by this Court where the prisoner had received a parole. Of course, respondents recognize that in *Weinstein* v. *Bradford,* supra, the prisoner's parole ripened into complete release and the Court therefore concluded that the prisoner no longer had any present interest affected by the policy of the parole board in that case. However, the respondents submit that the petitioner, by virtue of his parole, no longer has any present interest affected by the parole consideration procedures which are the subject of attack in this litigation even though that parole does not constitute complete release. *Weinstein* v. *Bradford,* supra.

Alternatively, petitioner relies upon *Sosna* v. *Iowa,* 419 U.S. 393 (1975) and *Gerstein* v. *Pugh,* 420 U.S. 103 (1975) in urging that the instant case is a class action and as such the cause still survives through the members of the class even though petitioner has been released on parole and may no longer be a proper party to this action. However, the respondents urge that the aforementioned authorities are not applicable to the case at bar. Significantly, both *Gerstein* v. *Pugh,* supra, and *Sosna* v. *Iowa,* supra, were certified as class action suits,

as a consequence of which the members of the class were imbued with a legal status which survived the removal of the named parties from those cases. The instant case, although initiated pursuant to 42 U.S.C. § 1983 and containing class action allegations, was never certified as a class action under Federal Rule of Civil Procedure 23. A suit does not become a class action merely because it has been demanded in the complaint. *Albertson's, Inc.* v. *Amalgamated Sugar Co.,* 62 FRD 43, (D.C.Utah, 1973), affirmed in part, reversed in part 503 F.2d 459 (10th Cir. 1974).

As noted in *Weinstein* v. *Bradford,* in the absence of a class action it is the teaching of *Sosna* v. *Iowa,* supra, that the "capable of repetition yet evading review" doctrine is limited to the situation where (1) the challenged action was of too short a duration to be fully litigated prior to its cessation or expiration *and* (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. As in *Weinstein* v. *Bradford,* the case at bar is not a class action and respondents have established that petitioner fails to meet the latter of the two elements set out above. Therefore, respondents respectfully submit that the case is moot.

Furthermore, it should be noted that the respondents maintained before the Circuit Court of Appeals that *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), should be construed as requiring petitioner's complaint to be treated as a petition for writ of habeas corpus under 28 U.S.C. § 2254, rather than as a civil rights action under 42 U.S.C. § 1983. Cf. *Baskins* v. *Moore,* 362 F.Supp. 187

(D.S.C. 1973). This contention was predicated upon the ground that parole release consideration is of an uniquely personal nature and, if petitioner's contentions on the merits proved true, it is conceivable that his incarceration might not have been legal. Thus, the case would more appropriately be one of habeas corpus application than of civil rights. This is significant because habeas corpus proceedings cannot usually be maintained as class actions.

Insofar as petitioner's motion for leave to substitute named parties is concerned, respondents submit that it is without legal foundation in light of the fact that this case is not a class action. Furthermore, petitioner's alternative motion for intervention, predicated upon *Mullaney* v. *Anderson,* 342 U.S. 415 (1952), is also without merit. The extenuating circumstances in *Mullaney* are not found here. The motion for intervention in the case at bar is merely an attempt to keep alive a cause which is now moot and therefore the motion, which may not be timely, should not be granted.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT APPLY TO KENUCKY PAROLE CONSIDERATION PROCEEDINGS BECAUSE NO CONSTITUTIONALLY COGNIZABLE INTEREST IN LIBERTY IS AT STAKE.

Prior to 1972 courts throughout this country unanimously and consistently rejected the contention that the Due Process Clause applies to parole consideration

proceedings. 'Generally speaking, matters pertaining to parole consideration, revocation, and the right to good time credits were not deemed to be within the proper purview of the courts since they were considered matters of "grace" and of privilege — not of right.

However, on June 29, 1972, this Court handed down its Opinions in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Although only the first of these dealt with a prison situation, all three cases are significant in that, when considered together, they definitively establish the manner in which interests, alleged to be protected by the Due Process Clause of the Fourteenth Amendment, are to be analyzed in order to reach a determination of whether those protections in fact attach. In *Morrissey* v. *Brewer* this Court rejected application of the "right - privilege doctrine"[2] and held that the Due Process Clause was applicable to parole revocation hearings and that certain minimum requirements of due process must be

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1/ Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970), cert. denied 400 U.S. 1023 (1971); **Dorado v. Kerr,** 454 F. 2d 892 (9th Cir. (1972); **Tarlton v. Clark,** 441 F. 2d 384 (5th Cir. 1971), cert. denied 403 U.S. 934 (1971); **Ott v. Ciccone,** 326 F.Supp. 609 (W. D. Mo. 1970); **Madden v. New Jersey State Board of Parole,** 438 F.2d 1189 (3rd Cir. 1971); **United States ex rel Bey v. Connecticut Board of Parole,** 443 F. 2d 1079 (2nd Cir. 1971), vacated as moot 404 U.S. 879 (1971).

2/ Graham v. Richardson, 403 U.S. 365, 374 (1971).

met before a parole can be revoked. On the other hand, in *Board of Regents* v. *Roth* the Court concluded that the Due Process Clause did not require an opportunity for a hearing prior to the non-renewal of a non-tenured state teacher's one-year contract absent a showing that the non-renewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment. In *Sindermann,* the companion case to *Roth,* this Court concluded that the nature of the individual's interest, predicated upon an alleged *de facto* tenure policy of a school, may have been of such substance as to be a protected interest within the Due Process Clause and therefore affirmed the circuit court's remand of that case for further consideration.

The analysis given by this Court to the issue of the applicability or non-applicability of the Due Process Clause was similar in *Morrissey, Roth* and, to a lesser extent, in *Sindermann,* although the Court reached different conclusions in each case due to the particular circumstances involved. Nearly two years later this Court rendered its Opinion in *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), holding that once a state created the right to good time credit and recognized the deprivation of such as a sanction authorized for major misconduct, the prisoner's interest had real substance and was sufficiently embraced by the Due Process Clause of the Fourteenth Amendment as to entitle him to certain minimum procedures to insure that the state created right would not be arbitrarily abrogated. Again, this Court reached its conclusion as to the alleged applicability of the Due

Process Clause upon the basis of the principles enunciated in *Morrissey* and *Roth.*

In the wake of *Morrissey* v. *Brewer,* supra, lower courts have reconsidered the question of whether due process applies to parole consideration and release procedures. Since 1972 there has been a clear and distinctive split among various jurisdictions as to the determination of this issue in light of *Morrissey* v. *Brewer* and more recently, *Wolff v. McDonnell.* Whereas some have rejected the view that due process applies to parole consideration and release procedures, others have held to the contrary.[3] The significance and effect to be given those lower court decisions is questionable since in neither *Morrissey* nor any of its progeny has this Court

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3/ Compare **Scarpa v. United States Board of Parole.** 477 F.2d 278 (5th Cir. 1973), en banc, vacated and remanded for consideration of mootness 414 U.S. 809 (1974); **Farries v. United States Board of Parole,** 484 F. 2d 948 (7th Cir. 1973); **Mosley v. Ashby,** 459 F.2d 477 (3rd Cir. 1972); **Battle v. Norton,** 365 F.Supp. 925 (D.Conn. 1973); **Barradale v. United States Board of Paroles and Pardons,** 362 F.Supp. 338 (M.D. Pa. 1973); **Bradford v. Weinstein,** 357 F.Supp. 1127 (E.D.N.C. 1973), reversed 519 F.2d 728 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975); **United States ex rel Johnson v. Chairman of New York State Board of Parole,** 500 F.2d 925 (2nd Cir. 1974), vacated as moot sub. nom. **Regan v. Johnson,** 419 U.S. 1015 (1974); **Candarini v. Attorney General,** 369 F.Supp. 1132 (E.D.N.Y. 1974); **Childs v. United States Board of Parole,** 371 F.Supp. 1246 (D.D.C. 1973), affirmed 511 F.2d 1270 (D.C.Cir. 1974); **Johnson v. Heggie,** 362 F.Supp. 851 (D.Colo. 1973); **United States ex rel Harrison v. Pace,** 357 F. Supp. 354 (E.D.Pa. 1973); **In Re Sturm,** 11 Cal. 3rd 258, 521 P.2d 97 (1974).

dealt directly with the issue of parole *release* procedures. Moreover, the significance of such cases as *Board of Regents* v. *Roth* and *Perry* v. *Sindermann* has been either misconstrued[4] or ignored by the lower courts when dealing with constitutional due process issues pertaining to a prisoner's parole release hearings. The respondents respectfully submit that the application of the analytical principles enunciated in *Morrissey* v. *Brewer, Wolff* v. *McDonnell, Board of Regents* v. *Roth,* and to a lesser extent in *Perry* v. *Sindermann* to the case now before this Court will require the conclusion that the Due Process Clause of the Fourteenth Amendment does not attach to parole release hearings because the "nature of the interest" therein considered does not rise to constitutional magnitude. The petitioner on the other hand, relying on *Morrissey* v. *Brewer* and *Wolff* v. *McDonnell,* urges the opposite conclusion. The respondents will now direct this Court's attention to the consideration of what they consider the primary issue in this case: Whether due process attaches?

Generally speaking, the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of "liberty" and "property" and when such pro-

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4/ For example, see **Bradford v. Weinstein, 519 F.2d 728,** at 731 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975), and **United States ex rel Johnson v. Chairman, New York State Board of Parole,** 500 F.2d 925, at 927 (2d Cir.), vacated as moot sub nom. **Regan v. Johnson, 419 U.S. 1015 (1974).**

tected interests are in fact implicated, the right to some kind of prior hearing is paramount. *Board of Regents* v. *Roth,* at 569. However, the range and scope of interests which can be protected by procedural due process is not infinite. After all, the procedural requirements of the Due Process Clause do not attach to "every conceivable case of government impairment of private interest." *Cafeteria and Restaurant Workers v. McElroy,* 367 U.S. 886, 894 (1961).

It has now become axiomatic that in order to make a determination as to whether due process requirements apply in the first place, the Court must look not to the weight or degree of a particular individual's interest, but to the "nature of the interest" at stake to see if it falls within the Fourteenth Amendment's protection of "liberty" or "property" and thus is one entitled to constitutional protection. *Roth,* at 572. *Morrissey* v. *Brewer,* 408 U.S. at 481; *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). If, upon analysis, it is determined that the nature of the interest is within the "liberty" or "property" context of the Fourteenth Amendment, the procedural due process protections mandated by that Amendment will attach depending upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey* v. *Brewer,* supra, at 481; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168 (1951); *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970).

Here, the petitioner vigorously maintains that he had an interest in "liberty" of such substance as to be protected by the Due Process Clause of the Fourteenth Amendment. In support of this contention he relies upon

his *personal interest* in being granted parole and the fact that many such paroles are granted other prisoners. In short, he equates the "conditional liberty" of a parolee, as in *Morrissey*, and a statutorily created right to accrued good time credits, as in *Wolff*, to his own circumstances. Thus, he concludes that he suffered a "grievous loss" when the parole board deprived him of an alleged entitlement to conditional liberty by refusing to grant him a parole without according him procedural due process. The respondents disagree.

Obviously, the petitioner's personal interest in the possibility of his being paroled was of major concern to him. However, this particular circumstance is analogous to that in *Roth* where this Court recognized that the individual's personal interests in that case were of major concern to him — concern that surely was not insignificant. *Roth*, at 571. However, such a consideration as the individual's personal interest is only a part of the weighing process used to reach a determination of the *form* of hearing required in particular situations by procedural due process *after it has been determined that procedural due process protections attach.* And, as previously noted, the *initial determination* that must be made is whether due process requirements attach at all, and in doing so this Court will look not to the degree of concern an individual may have in a particular interest but to the "nature" of the interest at stake.

Here, the simple fact of the matter is that by

virtue of his felony conviction[5] the petitioner had been constitutionally deprived of any interest in his own liberty by mandate of law until such time as he had served the sentence meted out to him, minus good time credits. Cf. *Harrison* v. *Robuck*, Ky., 508 S.W. 2d 767 (1974). Under Kentucky law the petitioner was not entitled to any kind of liberty, conditional or otherwise. All that he was entitled to was a parole consideration hearing after he served the minimum period of time for parole eligibility. He was granted that hearing. Although the hearing might *possibly* have resulted in the petitioner being granted "conditional" liberty, such liberty was neither assured nor guaranteed. At the hearing conditional release was in fact denied and petitioner's case was deferred for two years. Hence, all that the petitioner lost for that period of time was the possibility of conditional liberty, which can best be characterized as nothing more than a "mere hope or anticipation" on the part of the petitioner and did not reflect an "interest" of such a nature as would be embraced by the Due Process Clause.

In *Morrissey* v. *Brewer*, this Court quoted approvingly from *United States ex rel Bey* v. *Connecticut State Board of Parole*, 43 F. 2d 1079, 1086 (2d Cir. 1971), vacated as moot, 404 U.S. 879, a case sharply distinguish-

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5/ Petitioner was convicted in the Kenton County, Kentucky Circuit Court of robbery, for which he received a ten year sentence, and armed robbery, for which he received a twelve year sentence. Both sentences were to be served concurrently.

ing between parole revocation and intitial parole decision making. That footnote reads as follows:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." 408 U.S. at 482, note 8.

The foregoing clearly indicates that this Court recognizes a substantial difference in the importance of maintaining one's conditional liberty as opposed to the "mere anticipation or hope of freedom." It is equally evident that this Court did not equate conditonal lberty with the hope of parole release. See also *Bradford* v. *Weinstein*, 357 F.Supp. 1127 (E.D.N.C. 1973), reversed 519 F.2d 728 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975). The manner in which a parole board exercises its discretion in granting or denying a parole to an incarcerated felon is clearly distinguishable from revoking a prisoner's conditional freedom once he is paroled.

As the District Court in *Barradale* v. *United States Board of Paroles & Pardons*, 362 F.Supp. 338 (M.D.Pa. 1973), pointed out:

> ". . . the interest which plaintiff has in being released on parole is not one which he is presently enjoying. Unlike a parole revocation hearing where one's continued liberty is at stake, . . . a prisoner applying for parole has no right to be released until he has served his full term less his good time credits. Whether he will be released on parole prior to the

> expiration of his sentence is wholly within the discretion of the Board." *Id* at 341.

In that case, as in the present one, there was no threat to an "existing private interest." *Ibid.*

Petitioner also offers *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), in support of his allegation that his interest in parole release should be sufficient to require the application of the Fourteenth Amendment. However, in ruling that prison disciplinary proceedings are subject to basic procedural requirements due to the possibility of revocation of good time credit, this Court relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), providing for the allowance and reduction of good time. The Court stated:

> ". . . the State itself has not only provided a *statutory right* to good time credit but also specifies that it is to be forfeited only for serious misbehavior . . . the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's *interest has real substance* and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. (Emphasis added).

Thus *Wolff* is merely another instance in which this Court has required due process protections because the nature of the interest involved, i.e. days of liberty in

the form of good time credit guaranteed to him by a state statute, rises to constitutional magnitude. It is inapposite where, as here, no statutorily created right is extended and then withdrawn.

The Commonwealth of Kentucky does not grant the inmate a right to parole, but grants the Parole Board the *discretion* to release an inmate on parole. KRS 439.340 and 439.330. KRS 439.340 provides:

> "(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history to the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.
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> "(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.
>
> "(3) The Board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform."

It is clear that before the respondents can grant a parole under KRS 439.340(2), the Board must in its discretion determine that the inmate being considered is "able and willing to fulfill the obligations of a law abiding citizen." All that an inmate has at any time before this determination is made is a mere anticipation or hope of parole release. Such an anticipation is not an interest of "real substance" within the meaning of the Fourteenth Amendment. For example, the Fifth Circuit Court of Appeals in a post-*Morrissey* decision held that an interest in parole release is not a right protected by the Fourteenth Amendment:

"The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protections attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status.

". . . [Petitioner] Scarpa is a convicted felon currently incarcerated in prison for his past transgressions. This manifest deprivation of liberty is the result of a due process hearing. The sentencing judge mandated a possible confinement of eight years. Scarpa now attempts to equate the possibility of conditional freedom with the right to conditional freedom. We find such logic unacceptable.

"If the Board refused to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the court . . . ." *Scarpa* v. *U.S. Board of Parole,* 477 F. 2d 278 at 282, vacated and remanded for consideration of mootness, 414 U.S. 809 (1973); Also see *Wiley* v. *Board of Parole,* 380 F. Supp. 1194 (M.D. Pa. 1974).

The reasoning set out above in *Scarpa* is equally applicable to the case at bar because, as previously noted, the petitioner had been constitutionally deprived of any right to liberty for the duration of his sentence. Peti-

tioner suffers no deprivation by being denied parole, he merely continues in the same status as before. Clearly, the nature of the interest in issue here is not one embraced by the Due Process Clause of the Fourteenth Amendment.

Furthermore, it is of inescapable significance that in each and every instance the protections attendant to the Due Process Clause have only been extended where an individual is *presently enjoying* or is *presently entitled* to an interest which has been extended to him. For example, in *Morrissey* v. *Brewer,* the individual was enjoying conditional liberty as a consequence of having been extended a parole. This Court concluded that the individual's interest in the conditional liberty was of such substance as to result in a "grievous loss" if it were revoked without a due process hearing. Similarly, in *Wolff* v. *McDonnell,* a prisoner had accrued good time credits which were guaranteed to him by state statute. In *Wolff* this Court held that once those good time credits accrued to the prisoner, they could not subsequently be taken away without the benefit of a due process hearing. Here, on the other hand, the respondents have established that the nature of the interest is not of such magnitude as to invoke the protection of the Due Process Clause. It would be incongruous to conclude that the Due Process Clause applies here where the petitioner is entitled to no liberty whatsoever[6] and thus can suffer no loss of liberty as a

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6/ The petitioner has predicted his case upon the "liberty" aspect of due process as opposed to that of "property." In any event, this Court has recognized that the analysis of both concepts are parallel. **Wolff v. McDonnell,** at 567.

consequence of the actions taken by the respondents. This being so, no grievous loss occurs. Therefore, it is respectfully submitted that the petitioner had no constitutionally cognizable interest in liberty at stake. Accordingly, the protections afforded by the Due Process Clause of the Fourteenth Amendment do not attach to parole consideration procedures in Kentucky.

III.

ALTHOUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MAY APPPLY TO KENTUCKY PAROLE CONSIDERATION PROCEEDINGS, RESPONDENTS ASSERT —AND REQUEST THE OPPORTUNITY TO PROVE—THAT THEIR PRESENT METHODS OF CONSIDERATION AFFORD ALL NECESSARY CONSTITUTIONAL PROTECTIONS.

A. IF THE SUMMARY DISMISSAL OF PETITIONER'S COMPLAINT WAS ERRONEOUS, THIS CASE SHOULD BE REMANDED FOR THE PURPOSE OF DEVELOPING EVIDENCE OF THE ACTUAL METHODS OF CONSIDERATION UTILIZED BY THE RESPONDENTS.

Because the lower courts have deemed the petitioner's complaint subject to summary dismissal, the respondents have never had the opportunity to refute the factual allegations set out in that complaint. Given this state of the record, respondents respectfully submit that it would be singularly inappropriate for this Court to reach the question of whether the actual facts, as opposed to those pleaded, demonstrate that the respondents' present methods of practice in parole consideration proceedings are constitutionally infirm. Respondents accordingly urge that should this Court determine that the Due Process Clause of the Fourteenth Amendment in fact governs those proceedings, it should forego delving into the delicate balancing process required for ascertaining exactly what minimal constitutional safeguards are applicable to them. Indeed, petitioner has recognized the difficulties which would be encountered in attempting to formulate meaningful procedural guidelines in the context of the present record, and he too has recognized that the more appropriate course may be to remand this case for an evidentiary hearing without now specifying what process is due. (Brief for Petitioner, 41-44).

B. THE VERY NATURE OF PAROLE CONSIDERATION PROCEEDINGS MILITATES AGAINST IMPOSITION OF THE ADVERARY PROCEDURES WHICH PETITIONER CLAIMS ARE CONSTITUTIONALLY REQUIRED.

Should this Court consider remand unnecessary, the respondents submit that the kind of adversary procedures which petitioner seeks to have implemented in parole consideration proceedings would unduly impair both the interests of the respondents and the interests of the prisoners with whom they deal. The due process standard is, after all, flexible and it mandates only such procedural safeguards as the particular situation demands. "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Cafeteria and Restaurant Workers Union v. *McElroy*, 367 U.S. 886, 895 (1961).

The Kentucky Parole Board was created for the specific purpose of ordering paroles "for the best interest of society" upon determining that convicted felons incarcerated in Kentucky penal institutions have been sufficiently rehabilitated to be ". . . able and willing to fulfill the obligations of . . . law abiding citizen(s)." KRS 439.340(2). In order for the respondents to properly execute their legislatively mandated task, they must draw upon all available information which may enable them to reasonably predict whether a given prisoner is ready to undertake the responsibilities and accompanying strains which will be encountered if he is allowed to return to the free community. The respondents' concern is for the individual prisoners as well as for the society at large, and it is imperative that this duality of concern be kept in mind in prescribing the procedural safeguards which the respondents must afford to the prisoners they consider in order that it may be assured that the forms of practice imposed do not frustrate them in their attempt to make the best decision for the state and for the individuals.

The respondents' position is substantially identical to that described by Judge (now Chief Justice) Burger in *Hyser* v. *Reed*, 115 U.S.App.D.C. 254, 318 F.2d 225, cert. denied sub nom. *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963):

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed

> in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. 'Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.' *Williams* v. *People of State of New York*, 337 U.S. 241. at 249, 69 S. Ct. 1079, at 1084, 93 L. Ed. 1337.
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> "Fundamentally the Parole Board's interest and its objective are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under supervision as long as he is a good risk." (318 F. 2d at 237, 242).

Certainly the situation in this case is far different from that presented in the context of parole revocation hearings and, as this Court has stated, even those hear-

ings are ". . . not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation." *Morrissey* v. *Brewer*, 408 U.S. at 480. It is, in fact, the respondents' position that the distinction between parole consideration proceedings and parole revocation proceedings is so substantial that a far greater reduction of the "full panoply of rights" than Morrissey allowed for revocation hearings should be tolerated in initial consideration proceedings. Respondents believe that in view of this distinction, the methods of consideration which they presently employ would upon remand be determined to sufficiently satisfy the requirements of the Due Process Clause. Further, even if some deficiencies were found in the respondents' current practice, the present methods of consideration are clearly far more appropriate to the non-accusatory parole consideration process than is the kind of adversary procedural format for which the petitioner contends.

Petitioner insists on four connected procedural rights which he believes are constitutionally required in parole consideration proceedings. He first asserts that the respondents must given him notice of and the right to dicover all factual information which might cause them to find it inappropriate to order immediate parole. Second, he contends that he ought to be granted a more lengthy and thorough-going interview with respondents than is permitted under present practice in order that he may argue away or rebut the "adverse" information in his file. Third, he professes a need for the representation of an advocate who can effectively argue for his

expeditious release before the respondents. Finally, he demands that if the respondents fail to conclude that parole is presently appropriate, they enter written findings explaining the reasons for not so concluding and outlining the conditions or requirements which the disappointed prisoner should fulfill in order to achieve parole release when next appearing for consideraton.

Analyzing petitioner's demands in the order in which they are made, respondents first submit that it would constitute a pernicious and counterproductive policy for inmates to have discovery of all "adverse" information contained in their files. The statutorily mandated content of every prisoner's file consists of his criminal record, social history, institutional record and reports and evaluations which case workers and other correctional personnel are required to assemble. KRS 439.340(1). Since the inmate knows his own criminal record and is aware of any formal disciplinary actions which have resulted from his institutional misconduct, realistically speaking the only "adverse" information which he could discover by being allowed to review his file would be unfavorable parole suitability evaluations compiled by correctional officers. The harm inherent in allowing an inmate access to this particular type of information is obvious. Beyond the fact that the reports may appear to the inmate to be more unfavorable than they actually are, it will be impossible as a practical matter to obtain honest and straightforward reports upon an inmate's institutional adjustment and suitability for parole if the staff personnel charged with making those reports are aware of the fact that an inmate whom

they evaluate unfavorably will have free access to the contents thereof.

Secondly, petitioner's request for a more extensive personal interview with respondents would not only entail an overwhelming administrative burden, but would also fly in the face of the essential nature of parole consideration proceedings. The inmate already has the opportunity to freely assert any information favorable to his case for release that he has in his own possession. Since there are no accusers in these proceedings and the inmate is not being "charged" with specific or general misconduct, it is difficult to discern the necesssity or utility of extending to the inmate the right to cross-examine those correctional personnel whose reports are made part of his file. It cannot be stressed too often that parole consideration proceedings are not adversary in nature and that there are therefore no accusers whom the inmate ought to have the right to confront. Further, there is little general or specific information of relevance which the inmate could produce should he be extended compulsory process for obtaining witnesses in his own behalf because respondents perform a predictive, not a fact-finding function.

Third, petitioner's contention that he ought to be allowed the representation of an advocate once again demonstrates that he misconstrues the nature of parole consideration procedures. Petitioner intimates that parole interviews are complex, procedure-laden, adversary proceedings wherein specific disputed facts are to be proven or disproven. A right to counsel is therefore asserted. But an absolute right to counsel was not even found in

the context of parole revocation hearings, *Morrissey*, supra, and certainly there is much less constitutional basis for arguing that an inmate ought to be represented by counsel at an interview at which the respondents are not exploring alleged misconduct, but are attempting to determine whether the prisoner is suitable for conditional release. The respondents do not determine cases based upon narrow inquiry into specific facts, but rather make broad based predictions of future conduct based upon generalized behavioral data and attitudinal perceptions. An attorney or lay advocate would be hard pressed to refute such generalized information. Hence, it is not probable that representation by an advocate would improve an inmate's chance for parole. On the other hand, it is quite probable that permitting inmates to appear with advocates would over-complicate the proceedings had before the respondent Board and bring an end to its efficient and expeditious operation. The facts, therefore, militate against a right to counsel in parole consideration proceedings. *Menechino* v. *Oswald*, 430 F.2d 402 (2d Cir. 1970), cert. denied 400 U.S. 1023 (1971).

If petitioner is entitled to any court ordered alteration in Kentucky parole consideration proceedings, then he may be entitled to his last demanded right to have a written statement of reasons for parole deferment. *United States ex rel Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir.), vacated as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015 (1974). Petitioner's ability to make this demand is, however, subject to question because he admits that the

respondents gave him an explanation for their action. Respondents told the petitioner that he was being deferred because they believed he needed to "have more time to get together." (App. 6). The respondents thus informally told petitioner that his record did not indicate he was yet ". . . able and willing to fulfill the obligations of a law abiding citizen." KRS 439.340(2). Since the respondents' statement of reasons is expressed in terms relating to the discretion vested in them by statute, petitioner's demand for further explanation must be understood as an assertion that the statement is inadequate as a matter of law under the Due Process Clause. The respondents, however, acted within the discretion granted to them by the Kentucky General Assembly. If their actions offended the Due Process Clause, the offense must result from the fact that the General Assembly has delegated so much discretion to them that they are empowered by the statute to arbitrarily exercise legislative prerogatives. If this conclusion is to be accepted, then the organic law of the Kentucky parole system is unconstitutional because it attempts to grant the respondents legislative discretion. Accordingly, far from being entitled to have a more definitive statement of reasons why he was not released on parole in 1973, petitioner is not entitled to the conditional freedom he presently enjoys. He was released under a statute which is void because unconstitutional under the Due Process Clause. Thus, the only "relief" to which the petitioner is entitled is to be returned to prison.

Petitioner is not, of course, seeking to have the

entire Kentucky parole system branded as null and void under the United States Constitution. What he really wants is a court ordered revision of KRS Chapter 439 requiring the respondents to set up hearing procedures not envisioned at the time that chapter was originally enacted. Perhaps as a matter of policy it would be preferrable if new procedures were implemented resulting in the petitioner being granted his request for a full blown written rationale in cases where parole release is deferred. Perhaps the petitioner is also right when he says it would be better if in such cases the respondents set out exact pre-conditions which when fulfilled would insure parole release in the future. But, the Kentucky parole system was set up as it now operates by the Kentucky General Assembly and petitioners requests for changes in that system for policy reasons should be addressed to that body, not to this Court. *Harrison* v. *Robuck*, Ky., 508 S.W 2d 767 (1974). Unless the petitioner is willing to have this Court invalidate the entire Kentucky parole system, all of his demands for specific procedural protections not presently being accorded in parole consideration proceedings must be viewed merely as requests for changes in policy and not as attempts to enforce rights created by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Respondents submit that this case has been mooted by virtue of petitioner's parole release. However, if this Court disagrees with that conclusion respondents

steadfastly contend that petitioner had no liberty at stake when he was initially considered for parole and, hence, that parole consideration proceedings are not governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, respondents submit that the Opinion of the United States Court of Appeals for the Sixth Circuit should be affirmed. Should this view not prevail, respondents request that the case be remanded so that they may have the opportunity to prove that their present procedures provide all protection which prisoners being considered for parole are due. In any event, respondents urge that the specific protections requested by the petitioner are inapposite in the non-adversary context of parole consideration proceedings.

Respectfully submitted,

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